Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on July 7, 1977 and July 13, 1977 in Cases No. 76-3428, 77-1214, 77-1215 and 77-1539 and on July 14, in No. 77-2547.

THE RULINGS BELOW

No opinions were filed by the Court of Appeals in any of the cases involved in this petition. The relevant orders of the Court of Appeals in Cases 76-3628, 77-1214, 77-1215, 77-1539 and 77-2547 are reproduced as Appendix A, *infra*, pp. 1a to 7a.

There are no district court opinions which are relevant to the issue here raised.

JURISDICTION

The orders of the Court of Appeals for the Ninth Circuit were filed on July 7, 1977, and July 13, 1977 in Cases 76-3628, 77-1214, 77-1215 and 77-1539 and on July 14, 1977 in Case No. 77-2547.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Do 28 U.S.C. §§ 46(b) and (c) require that a panel of three judges be assigned to decide every civil case and controversy raised before a Court of Appeals, including petitions for extraordinary writs, and prohibit a Court of Appeals from assigning panels of only two judges to make such determinations?

2. If the answer to question 1 is "yes" and timely objection is made by an adversely affected party, may the original void two-judge decision be validated by procuring the subsequent concurrence of a third originally non-participating judge, or must a new panel of three judges be assigned to consider the case *de novo*?

STATUTES INVOLVED

This case directly involves 28 U.S.C. § 46 as follows:

"§ 46. Assignment of judges; divisions; hearings; quorum

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies be separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and

hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

STATEMENT OF THE CASE

This case brings before the Court the unusual question of whether a United States Court of Appeals may routinely assign two judge panels to dispose of cases and controversies, including petitions for extraordinary writs under 28 U.S.C. 1651, and whether a party that objects promptly upon notification of the relegation of its case to such a panel is entitled to the assignment of a three-judge panel for *de novo* review.

A. The Events Below

On March 28, 1977, the Ninth Circuit filed an order (App. A, *infra*, p. 1a) of only two judges, Trask and Wallace, dismissing Appeals 77-1214 and 77-1215 "for lack of jurisdiction, the orders appealed from not being appealable". On the same date, the Clerk addressed a letter to counsel (App. A, *infra*, p. 2a) stating "an opinion was filed and a judgment entered in the above case

today, March 28, 1977, dismissing for lack of jurisdiction." (App. A, *infra*, p. 2a).

By the same two-judge order dated March 28, 1977, the Ninth Circuit "denied" the petitions for writ of mandamus in Nos. 76-3628 and 77-1539.

On April 4, 1977, petitioner Lee Pharmaceuticals, filed a motion addressed to the court *en banc* to vacate the aforementioned two-judge order. This motion specifically presented the question of "whether a panel or division composed solely of two judges of [the Court of Appeals] may determine any case or controversy".[1]

On April 28, 1977, the Court of Appeals filed an unsigned "Revised Order". (App. A, *infra*, p. 3a) This "Revised Order" states that the matters with which it deals were "Before" the same two judges, Trask and Wallace who filed the original two-judge order and also "Before" a third circuit judge, Choy. This "Revised Order" states that "on April 4, Lee Pharmaceuticals filed [a motion] for *en banc* consideration of the authority of the panel which issued this court's order of March 28, 1977. Solely to facilitate the proceedings of the district court the court issues the folowing order"—which order reiterates the April 28, 1977 rulings of the two-judge panel.

The "Revised Order" also states:

> "This order shall in no way be construed as a comment on the merits, or lack therof, of the arguments set forth in the emergency motion addressed to the court en banc." [2]

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[1] This motion also asked that the times for seeking reconsideration of the April 28, 1977 order be suspended pending disposition of the issue of the authority of the two-judge panel to act.

[2] The "Revised Order" also denied petitioner's motion to suspend times for filing requests for rehearing and set new times under Appellate Rules 40 and 41 to "commence from the date of entry of this order". Such rehearing requests were duly filed.

On May 9, 1977, petitioner filed a "Supplementary Statement . . ." in support of the original, April 4, 1977, motion addressed to the court *en banc* to set aside the March 28, 1977 judgments. This Supplementary Statement points out that the " 'Revised Order' is null and void for precisely the same reasons that the original order was null and void . . ."—*i.e.*, "because contrary to the provisions of 28 U.S.C. 46(b) and hence in violation of Lee's constitutional right to procedural due process." It further urges that

> "The 'Revised Order' . . . is purely cosmetic. It effects no substantive change in the *character* of the original two judge order. It does not and could not cure the fatal defect of that original order because it is *de facto* the same null and void decision by an improperly constituted two-judge panel, simply ratified after the fact by a third judge. As such, it is a mere indirect effectuation of action that this Court was statutorily precluded from taking directly—*i.e.* the determination of a case or controversy by an improperly constituted panel. The fact remains that no *panel* of three judges has ever been given an opportunity to decide any of the captioned matters *ad initio* as a *panel* in accordance with the minimal requirement of procedural due process under existing law.
>
> "Directly in point in the circumstances is the holding of the Supreme Court in *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) as follows:
>
> > 'A fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have

wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted.'

"Here, the original improper assignment of a two-judge panel and the improper final disposition by that two-judge panel of all captioned proceedings can be cured only, as in *Armstrong*, 'by granting. . . . [the Lee] motion to set aside the decree and consider the case[s] anew.' . . ." (Emphasis in original).

On July 7, 1977 the Court of Appeals filed an unsigned order stating in its entirety:

"The emergency motion addressed to the court en banc having been circulated to the active bench and no judges electing to accept the suggestion for hearing en banc, the motion is hereby denied." (*infra*, p. 5a)[3]

On July 11, 1977 petitioner filed a further petition for writ of mandamus, assigned Case No. 77-2547 by the Court of Appeals. This petition is directed to a further compromise of Lee Pharmaceuticals' right to a jury trial in the specific context of trade secret issues through an order entered on June 28, 1977. On July 14, 1977 the Court of Appeals filed an order (App. A, *infra*, p. 7a)

[3] In the meantime, petiitoner filed petitions for rehearing. On July 11, 1977, the Court of Appeals filed an unsigned order in Appeals 77-1214 and 77-1215—with no indication of the identity or number of the judges who made the decision—stating in its entirety:

"Upon due consideration, the petition for rehearing en banc regarding the Court's dismissal of appeal nos. 77-1214 and 77-1215 for lack of jurisdiction is denied." (*infra*, p. 5a)

On July 13, 1977, the Court of Appeals filed an unsigned order (*infra*, p. 6a) dealing with matters "Before: Trask, Choy and Wallace, Circuit Judges" denying petitions for rehearing in the mandamus petitions, Nos. 76-3628 and 77-1539.

of a panel of only *two* judges stating that "Upon due consideration, the petition for writ of mandamus is denied."

B. Pervasiveness of Ninth Circuit Resort to Two-Judge Panels

The Court of Appeals for the Ninth Circuit for several years has had a practice whereby it assigns judges in "panels" of only two rather than the three specified in 28 U.S.C. §§ 46(b) and (c), to dispose of *at least* substantive motions and petitions for extraordinary writs. It appears that currently all matters not specifically scheduled for oral argument may be referred for disposition to motion panels of only two judges. Appendix B, *infra*, p. 8a reproduces paragraphs 7-15 of the affidavit of petitioner's counsel dated April 4, 1977 recounting facts learned from the Ninth Circuit clerk's office concerning the nature and origin of the practice and its basis, if any, in published rules or statutes. In essence, these facts show that under the unpublished General Orders of the Court which "do not have standing as Rules of the Court and are not to be published or referred to in opinions or orders entered in any case" (General Order No. 27, *infra*, 16a),[4] procedures have been established for the regular use of only two judges from duly appointed panels of three to dispose of various motions in noncalendared cases before that Court. Even the letter of these "General Order" procedures, however, has apparently been somewhat eroded in favor of increased resort to summary dispositions by two judge panels, *inter alia*, in substantive matters that constitutionally qualify as "cases" and "controversies". Pointedly,

(a) General Order No. 3 (*infra*, 13a) contemplates that two-judge panels shall deal only with "motions in

[4] Note that these General Orders "are regarded as public records . . . available, during office hours for inspection on request of members of the bar of this Court, or unrepresented litigants in a case pending before the Court."

cases not calendared" and emphasizes that "Some such motions may be of a kind that action by three judges will be considered desirable."

(b) General Order No. 4 (*infra*, 15a) specifies that

> "Applications for writ of mandamus, prohibition and other extraordinary writs, whether addressed to an individual judge or to the Court, shall be deemed addressed to the Court unless, for emergency reasons, it is necessary for an individual judge to act thereon. Upon the filing of such an application, it shall, unless for emergency reasons an individual judge should act thereon, be immediately referred to a panel of three judges."

These general orders do not define the *actual* current Ninth Circuit practice, as this case illustrates. That practice has been elasticized to the fullest extent, in the interest of expedient but speedy disposition of pending matters, without regard to due process, justice and fair play.

This same attitude has infected the district court in this case, so that the trial judge, apparently confident that there will be no appellate correction, has eschewed the rules, the statutes and the relevant precedent to deal with petitioner's substantial case for patent and trademark infringement, and unfair competition, including trade secret misappropriation, in an unprecedentedly arbitrary fashion.

Subsequent summary final disposition of petitioner's appeals and mandamus petitions by a two-judge motion panel effectively leaves petitioner without any hope that justice is even available, much less likely to prevail.

In its March 28, 1977 one page order, a two-judge Ninth Circuit panel of Circuit Judges Trask and Wallace:

(1) *Sua sponte* dismissed "for lack of jurisdiction, the orders appealed from not being appealable", consolidated

Appeals 77-1214 and 77-1215 which sought relief pursuant to 28 U.S.C. 1292(a) from the *de facto* denial of a preliminary injunction consequent from the refusal of the district judge, for more than six months after it was first requested in April of 1976, to hold a hearing on petitioner's application of a preliminary injunction to terminate the use of its misappropriated trade secrets. This refusal was effected in the district court through improper Rule 42(b) severance orders by which the district judge *sua sponte* subordinated consideration of the issue of misappropriation of the plaintiff's trade secrets to an early and separate trial on the issue of validity of plaintiff's patents in suit, in derogation of the existing law of the case. The availability of appellate relief under 28 U.S.C. 1292(a) when the district court refuses to hold or to proceed with, a preliminary injunction hearing or to make a timely ruling after hearing is supported by case law in other circuits, including *United States* v. *Lynd*, 301 F.2d 818 (5 Cir. 1962) and *Dellinger* v. *Mitchell*, 442 F.2d 782, 788 (D.C. Cir. 1971) with which the order dismissing appeals in cases 77-1214 and 77-1215 is in conflict.

(2) Denied No. 76-3628, a petition for extraodinary writ, apparently by answering negatively the question of "whether the subject matter is appropriate for writ procedure" (General Order No. 4, *infra*, 15a). This petition was grounded upon an illicit *sua sponte* curtailment of petitioner's right to a jury trial on the patent validity issues. This ruling is in the teeth of *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959) and *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962). Notably, these cases counsel that correction by mandamus of any unauthorized curtailment of jury trial rights is a "responsibility of the Federal Courts of Appeal" (*id.* at 472).

(3) In No. 77-1539, apparently also held mandamus to be an inappropriate remedy. This petition raised serious

questions resulting from the district court's abrogation of the Federal Rules of Civil Procedure in favor of resort to what the district judge himself characterized as "unusual and innovative procedures" of his own expedient devising, including but not limited to suspension of all discovery rules, the threat of illicit reference of trade secret issues to a master,[5] the striking of affirmative defenses involving controverted facts in violation of Rule 12(f), severe curtailment of the right to request rehearing, and various other aberrancies.

That this summary two-judge disposition of serious issues is *usual* Ninth Circuit behavior is evident from the July 14, 1977 order of a *different* two-judge panel in No. 77-2547 which denies mandamus to correct a specific "unusual and innovative" order by the district judge in this case that (a) presumes to change the orders appealed from in Nos. 77-1214 and 77-1215, on which the appellate mandate has not issued, (b) establishes a procedure whereby the district judge without a jury will finally determine, *on a written record only*, whether petitioner's trade secrets are "valid" *before* it will entertain the now 15-month-old preliminary injunction motion and will so proceed even though (i) petitioner has never been permitted discovery concerning any aspect of the attacks to be made on such "validity" and hence is disabled to meet them, and (ii) a jury trial was timely demanded on the merits.[6]

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[5] Later implemented and then withdrawn solely because the chosen master was disqualified by virtue of his daughter's employment in the office of defendant's counsel.

[6] Another example of the Ninth Circuit use of a two-judge panel to dispose finally of a mandamus petition is apparent from the petition before this Court in No. 77-4 (see the petition at p. 9a) where the two-judge panel apparently held inappropriate to writ procedure the question of whether a judge should disqualify himself under 28 U.S.C. 455(a), and thus placed itself in direct conflict with decisions in other circuits including those in *SCA Services, Inc.* v. *Morgan*, No. 77-1194, (7 Cir. June 17, 1977) and *United States* v. *Ritter*, 540 F.2d 459 (10 Cir. 1976) and reversed, *sub silentio*, its own former stance on this issue as set forth in *Connelly* v. *United States District Court*, 191 F.2d 692 (9 Cir. 1951).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The case presents issues of first impression as to the limits which 28 U.S.C. §§ 46(b) and (c) impose on the power and jurisdiction of the federal courts of appeal to assign panels of less than three judges to determine cases and controversies arising under the Constitution and laws of the United States. The decisions of the appellate courts in most federal question cases are ultimately determinative of all issues presented, since this Court's power of review is but sparingly exercised.

The paramount need for decisions of such courts to be rendered by properly constituted panels is starkly evident and need not be belabored. The Ninth Circuit has refused even to give considered attention to whether its current use of two-judge panels to dispose of cases violates 28 U.S.C. §§ 46(b) and (c).

The importance of this question is perhaps best epitomized by reference to the careful attention this court has afforded to questions touching the valid composition of, and the powers of, *en banc* appeals courts.[7] The relative rarity of *en banc* sittings is to be contrasted with the situation here posed which goes to the heart of all federal appellate cases.

2. The questions here uniquely invoke the supervisory power of this Court. So far as the record shows or petitioner's counsel are aware, no federal court of appeals, except the Ninth Circuit, presumes to attempt to dis-

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[7] *See Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, 314 U.S. 326 (1941); *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953); *United States* v. *American Foreign Steamship Corp.*, 363 U.S. 685 (1960).

charge the duty to decide cases imposed by 28 U.S.C. § 46 in assigned panels of two judges.[a]

It is focal to the public interest and to the proper operation of the federal judicial system that the power of any court of appeals to so proceed be resolved promptly.

3. A certainty that all federal courts of appeal will function in a non-aberrant, procedurally predictable fashion is primary to the maintenance of a stable system of law, and essential to foster public confidence in the judiciary. The need for enhancing such public confidence has recently been a subject of intense congressional concern resulting *inter alia*, in enactment of the current version of 28 U.S.C. § 455.

The present Ninth Circuit attitude is one of complete expediency. The court is seemingly able to rationalize almost any departure from established practice that enables it to speed up its disposition of cases even when the practice is *a fortiori* prejudicial to the possibility of reaching a just result. This Ninth Circuit attitude is in marked contrast, *e.g.* to that of the Eighth Circuit, wherein "The cause of judicial economy does not override . . . fundamental principle" in respect of "the right of any litigant to obtain a fair trial in fact as well as in appearance" *United States* v. *Pfizer, Inc.*, No. 77-1088 (8 Cir. July 18, 1977).

The Eighth Circuit's view comports with the public policy of Rule 1 of the Federal Rules of Civil Procedure, approved by this Court, which puts "just" trials *at least* on a par with "speedy" disposition of cases.

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[a] Personal experience of petitioner's counsel within the last eighteen months in each of the Second, Third, Fourth, Fifth, Seventh and D.C. Circuits is that none of these courts attempts to utilize two-judge panels to decide cases, whether or not arising under 28 U.S.C. 1651.

The contrasting Ninth Circuit attitude is virtually impossible to explain to non-lawyers without thoroughly discrediting the judicial system and the rule of law. It should not be encouraged to persist.

4. The refusal of the Ninth Circuit to give considered attention to the legality of assigning two judge panels to dispose of cases likewise detracts from public confidence in its other actions and pronouncements. A court which is unanimously disposed not even to examine the propriety of its own conduct vis-a-vis the statutory limits on its own jurisdiction presents a picture of autocracy, smugness and insularity rather than openmindedness, fairness and justice. It encourages similar conduct from the lower courts within the circuit to the further detriment of the judicial system and the public—as starkly evidenced by the conduct of the district judge in this case.

5. The Ninth Circuit practice is wrong and should be corrected.

As the Ninth Circuit has itself recognized in *Young Properties Corp.* v. *United Equity Corp.*, 534 F.2d 847, 849 (9 Cir. 1976), "The Court of Appeals is a court of limited jurisdiction and its jurisdiction is expressly provided for by statute."

As stated in CJS Judges § 58, "The powers and duties of Associate Judges are ordinarily defined by the Constitution or statute; where responsibility is placed on two or more Associate Judges, it may not be assumed by only one, and, where it is placed on a single Judge, he may not share the responsibility for his decision with other Judges."

28 U.S.C. § 46(b), the controlling statute, mandates:

> "In each circuit the Court may authorize hearing and determination of cases and controversies by separate divisions, each consisting of three Judges. Such divisions shall sit at the times and places and hear

the cases and controversies assigned as the Court directs."

Under Federal Rule of Appellate Procedure 27(c) "a single Judge may not dismiss or otherwise determine an appeal or other proceeding. . . ."

The actual General Orders of the Court below are consonant. In particular, General Order No. 4 requires that applications for extraordinary writs shall be "immediately referred to a panel of *three Judges* . . ." and prohibits a single Judge even in emergency from denying such a writ.[9] Indeed, no published or publicly available Ninth Circuit general order or rule makes any reference to a *panel* of *only* "two Judges".

This Court in dictum in *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 254 (1953) noted that 28 U.S.C. § 46(c) re *en banc* hearings "was motivated by a dual purpose" which included "securing the tradition of three-judge courts against any further intrusion". See also the Ninth Circuit's own dictum in *Bridges* v. *United States*, 201 F.2d 254, 255 (9 Cir. 1952) that "A United States Court of Appeals consists of three circuit judges, and, in circuits having more than three judges, it consists of a 'Division' of three judges" and the Fifth Circuit dictum in *Allen* v. *Johnson*, 391 F.2d 527, 531 (5 Cir. 1968) that the work of the Federal Courts of Appeal "is ordinarily to be—and today it must be—done by three-Judge panels."

No authority recognizes any prerogative to assign two-judge panels to determine cases and controversies. Indeed, the Ninth Circuit's disinclination to consider, discuss or otherwise give prominence to the problem must be

[9] "[A]n individual judge . . . shall not deny the application, but may order that an answer be filed, all further proceedings to be had before a panel [of three judges]."

deemed a tacit admission that it cannot itself justify its conduct as a matter of law.

CONCLUSION

The writ should be granted.

Respectfully submitted,

EDWARD S. IRONS
Attorney for Petitioner

APPENDICES

APPENDIX A

ORDER

filed March 28, 1977

in

No. 76-3628
No. 77-1214
No. 77-1215
No. 77-1539

Before: TRASK and WALLACE, Circuit Judges

Upon due consideration, the Court issues the following order:

(a) the petition for writ of mandamus, No. 76-3628 is denied;

(b) the petition for writ of mandamus, No. 77-1539 is denied;

(c) the motion for extension of time is treated as a motion to file late response and is granted;

(d) the motion for stay is denied; and

(e) appeals Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable.

/s/ Ozell W. Trask

/s/ [Illegible] Wallace
United States Circuit Judges

MoCal 3/21/77

**Letterhead of Office of the Clerk for
U.S. Court of Appeals for
the Ninth Circuit**

March 28, 1977

TO ALL COUNSEL:

Re: Nos. 77-1214 & 77-1215—Lee Pharmaceuticals v. United States District Court for the Central Dist. v. Den-Mat, Inc., et al.

Dear Counsel:

An opinion was filed and a judgment entered in the above case today, March 28, 1977 dismissing for lack of jurisdiction.

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

/s/ Emil E. Melfi, Jr.
EMIL E. MELFI, JR.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal Rules of Appellate Procedure

CO 76.2

REVISED ORDER

filed April 28, 1977

in

**Nos. 76-3628
77-1214
77-1215
77-1539**

Before: TRASK, CHOY and WALLACE, Circuit Judges

On April 4, 1977, Lee Pharmaceuticals filed two emergency motions requesting a suspension of the periods for seeking rehearing and issuance of the mandate and for en banc consideration of the authority of the panel which issued this Court's order of March 28, 1977. Solely to facilitate the proceedings in the district court the court issues the following order:

(a) The petition for writ of mandamus, No. 76-3628 is denied;

(b) The petition for writ of mandamus, No. 77-1539 is denied;

(c) The motion for extension of time is treated as a motion to file late response and is granted;

(d) The motion for stay is denied;

(e) Appeals Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable;

(f) The emergency motion addressed to the court en banc shall be treated as a suggestion for hearing en banc and shall be circulated to the active bench for a vote; and

(g) The emergency motion to suspend the periods of time for rehearing and issuance of the mandate

is denied and new periods of time pursuant to Rules 40 and 41 Federal Rules of Appellate Procedure shall commence from the date of the entry of this order.

This order shall in no way be construed as a comment on the merit , or lack thereof, of the arguments set forth in the emergency motion addressed to the court en banc.

ORDER

filed July 7, 1977

in

No. 76-3628
77-1214
77-1215
77-1539

The emergency motion addressed to the court en banc having been circulated to the active bench and no judges electing to accept the suggestion for hearing en banc, the motion is hereby denied.

ORDER

filed July 11, 1977

in

No. 77-1214
77-1215

Upon due consideration, the petition for rehearing en banc regarding the Court's dismissal of appeal nos. 77-1214 and 77-1215 for lack of jurisdiction is denied.

ORDER

filed July 13, 1977

in

No. 76-3628
77-1214
77-1215
77-1539

Before: TRASK, CHOY, and WALLACE Circuit Judges

Upon due consideration, the Court issues the following order:

(a) the motion for extension of time to file petitions for rehearing is granted and the petitions heretofore received are ordered filed;

(b) the motions to defer consideration of the petitions for rehearing are denied;

(c) the "supplementation and petition for rehearing" filed in no. 76-3628 is denied; and

(d) the "supplementation and petition for rehearing" filed in no. 77-1539 is denied.

ORDER

filed July 14, 1977

No. 77-2547

Before: TRASK and ANDERSON, Circuit Judges

Upon due consideration, the petition for writ of mandamus is denied.

/s/ Ozel W. Trask

/s/ [Illegible] Anderson
United States Circuit Judges

APPENDIX B

PARAGRAPHS 7 to 15 OF AFFIDAVIT OF MARY HELEN SEARS IN SUPPORT OF EMERGENCY MOTIONS OF LEE PHARMACEUTICALS TO VACATE APRIL 28, 1977 ORDERS AND SUSPEND RECONSIDERATION TIMES

AVERMENTS WITH RESPECT TO FACTS RELEVANT TO THE MOTION TO SET ASIDE PORTIONS OF THE EXHIBIT A ORDER

7. Upon learning in the manner described in paragraph 2 hereof about this Court's order signed by two judges thereof and filed on March 28, 1977, I thereupon personally telephoned the Clerk's office of this Court and spoke with an unidentified member of the staff thereof from whom I inquired in substance:

(a) Whether this Court had in fact filed an opinion as Exhibit B suggests, in Appeals 77-1214 and 77-1215.

(b) Whether the Exhibit A order was solely the product of *two*, rather than three, judges. I was told, in substance, that under the rules of this Court, two judges can dismiss an appeal or deny a petition for an extraordinary writ such as mandamus. I then asked for identification of the rule and was told that the person to whom I was speaking could not help me and given a suggestion to call Mr. Melfi, the Clerk of the Court, on the next succeeding day.

8. The only copy of the rules of this Court available in my office in Washington, DC is contained in the bound volume and current pocket part of West Publishing Company's United States Code Annotated, Title 28, appellate rules volume, and I had several weeks earlier ascertained

that it is not up to date and that the deficiency is not wholly compensated either by the notices in the advance sheets of Federal Reporter Second or otherwise and had then attempted, without success, because such rules were said to be temporarily out of print, to procure a current copy of this Court's rules from the Clerk of the Court. Since on checking these available rule sources, I found no counterpart of the alleged rule of this court described by the unidentified person in the Clerk's office, I thereupon telephoned to Hubert W. Dubb, a lawyer of my acquaintance resident in San Francisco, California, and asked him if he could ascertain for me the number and precise wording of any rule of this Court that permitted a division of two judges only to dismiss an appeal or decide a mandamus petition.

9. Later on March 30, 1977, Mr. Dubb telephoned to me, and stated in substance that (a) he could find no such provision in the printed rules of the Court and (b) he had accordingly contacted Miss Taylor of the Clerk's Office of this Court and asked for help. He reported further that Miss Taylor had stated in substance her understanding that there was no written local rule governing the situation, but that it was a practice of this Court for only two judges, constituting those assigned each week to the motion calendar, to be assigned to consider any matter not calendared for oral argument and if they agreed on the disposition to be made, to fully decide the matter whatever it might be, *but* if they did not, for a third judge to be called in to break the tie. Mr. Dubb indicated that Miss Taylor had further told him in substance that this was considered appropriate as she understood it, because under federal law two judges are a quorum, but that she was not a lawyer and, hence, could not explain further.

10. On March 31, 1977, I received copies of Exhibits A and B by mail from this Court.

After I was certain, having due regard to the time difference between Washington, D.C. and San Francisco, that the Office of the Clerk of this Court would be open for business, I attempted to telephone Mr. Melfi in accordance with the suggestion of the unidentified person to whom I had spoken on the previous afternoon, and I learned that he was on vacation.

11. I thereupon endeavored to, and did, contact his secretary to whom I explained the nature of my inquiry and asked whether there was an assistant clerk who might be able to help me. She referred me to the Chief Deputy Clerk of the Court, who turned out to be Miss Taylor and who in substance told me just what she had told Mr. Dubb. I then inquired how long the two-judge panel practice had subsisted and whether anyone had ever objected to it, and she stated that the practice was "several" years old, and had not so far as she knew been objected to or protested. I further inquired in substance whether she knew of any written directive or justification upon which the Court relied to so proceed and she told me that she was not a lawyer, but that Mr. Schickele, an attorney on the staff of the Court, might be able to give me further information or assistance in that regard.

12. I thereupon spoke with Mr. Schickele, to whom I put my question as to whether there was any written directive authorizing reference to two judges only of this Court of a mandamus petition or an appeal. Mr. Schickele, in substance responded that while he was aware of the practice of referring motions to two judges only for decision, he did not know how long it had been in effect, or how it arose and did not know of any pertinent written directive. Upon further inquiry from me, he told me in substance that he knew of no written rationale or justification for the practice and though he believed he once heard of a challenge in the Supreme Court, he was wholly uncertain as to precisely what may have been challenged

or of what happened, if there was a challenge, and had never seen any relevant decision or other written disposition. He further suggested I talk to a gentleman whose name I understood to be Mr. Locke, the administrative officer of the Court, because of the latter's longer tenure with the Court and possible greater knowledge concerning the practice.

13. I thereupon telephoned this gentleman, to whom I made the same inquiries in substance as I had earlier made to various personnel of this Court as described hereinabove. He told me in substance that the basis for the practice is General Order 3 of the Resolutions of the Judicial Council of the Ninth Circuit, that he knows of no challenge to the practice heretofore and that it has subsisted for several years. He also called my attention to General Order No. 27 of the same Resolutions. I then asked whether copies of these general orders were obtainable and he stated to me that any member of the bar of the Court could obtain access to all Resolutions of its Judicial Council in the Clerk's office.

14. I thereupon telephoned Mr. Dubb and requested that some appropriate person from his law office go to the Office of the Clerk of this Court and obtain for me the text of General Orders No. 3 and 27 and any other parts of the Resolutions of the Judicial Conference that might appear pertinent.

15. Later that day, Mr. Hugh Finley of Mr. Dubb's law office telephoned me and reported that he had personally inspected all of the General Orders constituting the Resolutions of the Judicial Council of the Ninth Circuit Court of Appeals and that he had selected Nos. 3, 4 and 27 as being relevant to the various questions I had raised and had obtained copies of them.

At my request, he arranged for these copies to be transmitted to my office by telecopier. Exhibit C here-

to comprises a true copy of all information I thereby received.

16. To the extent that Exhibit A reflects disposition of No. 76-3627 by two judges only, these being judges assigned to the motion calendar for the week of March 21, 1977, it is inconsistent with advice earlier given me by an unidentified person on the staff of the Clerk's office. Specifically, on or about February 14 or 15, 1977, I inquired by telephone as to whether No. 76-3628, filed over sixty days earlier on or about December 13, 1976, had been forwarded to a panel for consideration and I was assured that it had been.

/s/ Mary Helen Sears

MARY HELEN SEARS

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Subscribed and sworn to before me personally this 4th day of April, 1977.

(Original Notarized)

Notary Public

GENERAL ORDERS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

General Order No. 3

Motions Calendars

1. *Motions in calendared cases.* Motions in cases already calendared for oral argument, under submission to a panel of the court or assigned to a screening panel of the court shall be submitted to that panel.

2. *Motions in cases not calendared.* Judges assigned to panels set up to dispose of weekly motion calendars shall be selected pursuant to a rotation system whereby each judge shall serve an equal number of times as the number one, number two and number three judges named on such panels. Motion panels shall be constituted of circuit judges in active service and senior circuit judges who are willing to act on motions. The selection shall be made sufficiently far in advance so that all judges will know, at least four weeks in advance, what weeks they will have been assigned to serve on such a motion panel. If a judge finds it impracticable or inconvenient to serve on a motion panel to which he has been assigned, it will be his responsibility to arrange for another judge to take his place.

The number one judge on a motion panel shall have the initial responsibility of preparing all proposed orders or memoranda necessary to process and finally dispose of the motion, except that where the motion is to be transferred to another panel, his responsibility shall end when such transfer is accomplished.

When an emergency motion, filed in compliance with Rule 6(g) of the Rules of the Ninth Circuit, is received by the Clerk, he shall immediately distribute it to the panel handling motions for that week, as provided in this

General Order, *provided* that two members of that panel are immediately available in San Francisco or Los Angeles to act upon the motion. There may be emergency motions with regard to which only judges immediately available in San Francisco could act with the required expedition, if practicable, a member of the current motion panel shall make this determination. In making such distribution, the Clerk shall call attention to the emergency character of the motion.

If two members of the current motion panel are not immediately available, but one is, the Clerk shall contact him, call attention to the problem and ask such judge to decide whether to: (1) grant a brief *ex parte* stay to enable the current motion panel to dispose of the emergency motion in the event such judge believes a stay is warranted, or (2) have the Clerk call upon an immediately available judge not on the current motion panel to assist in the disposition of the motion. Some such motions may be of a kind that action by three judges will be considered desirable. In the event no member of the current motion panel is immediately available, the Clerk shall immediately contact the Chief Judge and ask for a decision of the kind described above.

If it is necessary for the Clerk to call upon one or more judges not on the current motion panel, he shall do so by lot, accomplished by drawing the required number from the names of readily available judges.

The general motion calendars and associated materials shall be distributed not later than the Friday preceding the current motion-panel week. The Clerk may not supplement this calendar with additional non-emergency motions which become ripe for disposition during the course of that week. Except for emergency motions, the Clerk will distribute only those motions which have been served, and to which a response has been received, or the time for filing a response has elapsed.

General Order No. 4

Processing of Applications for Writs of Mandamus, Prohibition and Other Extraordinary Writs Other than Habeas Corpus

Applications for writs of mandamus, prohibition and other extraordinary writs, whether addressed to an individual judge or to the Court, shall be deemed addressed to the Court unless, for emergency reasons, it is necessary for an individual judge to act thereon. Upon the filing of such an application, it shall, unless for emergency reasons an individual judge should act thereon, be immediately referred to a panel of three judges.

Pursuant to Rule 21(b), Federal Rules of Appellate Procedure, the panel shall first determine, ex parte, whether the subject matter is appropriate for writ procedure. If the panel determines that the subject matter is not appropriate for writ procedure, it shall deny the application forthwith, subject however to a petition for reconsideration. Such summary denial shall not be regarded as a decision on the merits. If the panel shall determine that the subject matter is appropriate for writ procedure, it shall order that an answer to the application be filed by the respondents within the time fixed by the order, and further proceedings thereon shall be had as provided in Rule 21(b) of the Federal Rules of Appellate Procedure.

If, by reason of emergency, it is necessary that such an application be first brought to the attention of an individual judge, he shall not deny the application, but may order that an answer be filed, all further proceedings to be had before a panel.

A panel or an individual judge may, in the event an order is entered calling for an answer, enter a stay order to the extent authorized by applicable rules and statutes.

* * * *

Note: At the Warner Springs meeting, on February 23 and 24, 1968, it was the general view that a General Order should be promulgated governing internal procedure in such matters. Such procedure will replace our present "Leave to File" procedure but has about the same effect.

General Order No. 27

Use of General Orders

The General Orders of this Court pertain exclusively to the internal functioning of this Court and therefore do not have standing as Rules of the Court and are not to be published or referred to in opinions or orders entered in any case. Nevertheless, the General Orders shall be regarded as public records and the file of General Orders maintained by the Clerk shall be available, during office hours, for inspection on request of members of the bar of this Court, or unrepresented litigants in a case pending before the Court. Copies of applicable General Orders may also, on the request of a member of this Court, be supplied to visiting judges for their use in assisting with the work of this Court.

In addition to maintaining the original file of General Orders, the Clerk shall provide each judge of this Court, active or retired, with a loose-leaf book containing a complete set of the General Orders. Each order shall show the date on which it was entered and the effective date of the order.

Supreme Court, U. S.
FILED
AUG 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., et al.,

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This supplement to the petition for writ of certiorari is filed under Rule 24(5) to call attention to matter not available to petitioner at the time the petition was filed on August 12, 1977.

The petition questions the validity under 28 U.S.C. §§ 46(b) and (c) of a pervasive practice by the United States Court of Appeals for the Ninth Circuit to decide cases and controversies by panels consisting on only two judges rather than the three judges which the statute specifies.

This supplement calls attention to the following decisions which further demonstrate the pervasiveness of this Ninth Circuit practice:

1. The two judge Order in No. 76-3303 (*infra*, p. 1a) filed January 28, 1977 dismissing an appeal for lack of jurisdiction.

2. The two judge Order, also in No. 76-3303, (*infra*, p. 2a) filed June 6, 1977 denying the petition for rehearing and reaffirming the ruling dismissing the appeal.

3. The two judge "Memorandum Order" in No. 76-2919 (*infra*, p. 4a) filed June 7, 1977 denying, with a detailed statement of reasons, a petition for writ of mandamus.

4. The two judge Order in No. 77-1144 (*infra*, p. 9a) apparently filed February 21, 1977 denying the petion for writ of mandamus.[1]

Significantly, the several two judges orders denying the petitions for writ of mandamus conflict with the Ninth Circuit's own General Order No. 4 quoted at page 15a of the petition in this case. The practice reflected by these two judge orders instead appears to conform to that set forth in paragraph 9 of the affidavit of Mary Helen Sears which appears at page 9a of the petition in this case. As there stated, it apparently is the

> "practice of [the Ninth Circuit] for only two judges, constituting those assigned each week to the motion calendar, to be assigned to consider any matter not calendared for oral argument and if they agreed on the disposition to be made, to fully decide

[1] All four of the above-identified two judge orders are before this Court in No. 77-4. The first three such orders appear in the appendix at pages A-1 to A-8 of the "Brief on Behalf of Real Parties in Opposition to Petitioner for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit", filed July 29, 1977 in No. 77-4.

The fourth order appears in the petition for writ of certiorari in No. 77-4 at page 9a. This order is cited at page 10, n. 6 in the petition in this case.

> the matter whatever it might be, *but* if they did not, for a third judge to be called in to break the tie."

This practice is unacceptable under 28 U.S.C. § 46(b) and (c). The failure of a third judge to participate is significant even if the other two judges are in agreement as to the result.

The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge at the time the decision was made.

All that the Ninth Circuit now provides under its unpublished practice is an adjudication of issues of law and fact by two judges. Under 28 U.S.C. § 46(b) and (c) an adjudication by two judges is not enough. Indeed, if this were the law, the burdens of the Court of Appeals could be reduced by one-third overnight by assigning all cases to two judge panels.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3303

IN RE: SUGAR ANTITRUST LITIGATION
MDL 201

BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants-Appellants.

ORDER.

(Filed January 28, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration of the motion to dismiss, the appeal is dismissed for lack of jurisdiction. *Blackie* v. *Barrach*, 524 F.2d 891 (9th Cir. 1975).

SHIRLEY M. HUFSTEDLER
ANTHONY M. KENNEDY
U.S. Circuti Judges

Mo Cal 1/24/77

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3303

BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,
v.

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, U and I INCORPORATED (formerly Utah-Idaho Sugar Company),
Defendants-Appellants,

—AND RELATED CASES

ORDER.

(Filed June 6, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration, the petition for a rehearing is denied. Our decision in *Blackie* v. *Barrack* (9th Cir. 1975) 524 F. 2d 891, *cert. denied* (Oct. 4, 1976) 45 U.S.L.W. 3249, is dispositive in spite of appellants' argument that *Blackie's* application to their effort to secure

an interlocutory appeal heralds a *per se* rule of non-appealability of class certification orders. The present petition provides us no occasion to express an opinion as to what our reception would be to an appeal from a certification order in a different case.[1]

Petition for Rehearing is DENIED.

---

[1] It is noteworthy that even under the practice in the Second Circuit, the certification order in the present case would probably not be appealable until final judgment. (*See* Parkinson v. April Industries, Inc. (2d Cir. 1975) 520 F.2d 650, 658 ("Our court in *General Motors* recognized that an appellant would not be able to satisfy the three-pronged test for an immediate interlocutory appeal if he only questioned the propriety of the discretionary ruling of a trial judge that the requirements of Rule 23(b)(3) had been met. . . . The appellants' claims concern only the discretionary ruling of the district judge that the prerequisites of Rule 23(a) . . . and Rule 23(b)(3) have been satisfied . . . . We therefore dismiss the appeal.").)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2919

IN RE: SUGAR ANTITRUST LITIGATION
(M.D.L. No. 201)

AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, AMSTAR CORPORATION, CALIFORNIA BEEF GROWERS ASSOCIATION, THE AMALGAMATED SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY, and U AND I INCORPORATED,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS

MEMORANDUM ORDER.

(Filed June 7, 1977)

Before: HUFSTEDLER and GOODWIN, *Circuit Judges*

Petitioners seek a writ of mandamus to overturn the respondent-district court's certification of fifteen classes and three subclasses in a treble damages antitrust suit alleging price fixing under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1973). Petitioners argue, *inter alia*, that the district court abused its discretion in finding that the antitrust action satisfied the prerequisites to class action treatment under Fed. R. Civ. P. 23(a) and 23(b)(3). For example, they allege that common questions of fact or law (*see* Fed. R. Civ. P. 23(b)(3)) do not predominate over individual questions in the present action where the antitrust claims involve a variety of geographic and product markets as well as different pricing and distributing structures. Furthermore, petitioners argue that conflicts exist among class members which preclude a finding that the class representatives will adequately protect the interests of the class. (*See* Fed. R. Civ. P. 23(a)(4).)

In *Kerr* v. *United States District Court for the Northern District of California* (1976) 426 U.S. 394, the Supreme Court recently underscored the extraordinary nature of the mandamus remedy. ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . amounting to a judicial 'usurpation of power'. . . ." (*Id.*, at 402.) This circuit has interpreted *Kerr* in *Arthur Young & Co.* v. *United States District Court* (9th Cir. 1977) 549 F. 2d 686 to require a petitioner seeking mandamus to show that the district court committed "clear and indisputable" error *and* that no "alternative procedural means" are available to correct this error. (*Id.* at 692 (". . . If we determine that the error, if any, is not 'clear and indisputable,' or that there are alternative means available to correct the error . . . the writ will not issue. . . . Interference with the trial court's control over its own proceeding is not a matter

to be undertaken lightly or on the basis of mere speculation by the parties . .. about what may occur at some future date." *Id.*).)

Petitioners have not demonstrated that they are entitled to the writ under the *Arthur Young* test. Without passing on the merits of the lower court's certification, we hold that petitioners have not made a threshold showing of "clear and indisputable" error to invoke the writ. (*See Windham* v. *American Brands, Inc.* (4th Cir. 1976) 539 F. 2d 1016, 1021 (Although defendants argued that class action treatment was improper where differences in product and geographic markets as well as conflicts among class members created predominating individual questions as to proof of impact, the court noted that "there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act."); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.* (E.D. Pa. 1968) 43 F.R.D. 452, 457-58; *Siegel* v. *Chicken Delight, Inc.* (N.D. Cal. 1967) 271 F. Supp. 722, 726 ("It is the existence . . . of the alleged conspiracy to substantially lessen competition in the market place, to illegally restrain trade . . . and the conduct that established said conspiracy that form the common questions of law or fact in this case . . . . "The fact that the members of the class vary in size, type and market locations and the fact that there may be peculiar differences between them with respect to the determination of their damages . . . does [*sic*] not render this class action improper . . . ."); *In re Master Key Antitrust Litigation* (D. Conn. 1975) 70 F.R.D. 23, 26, *appeal dismissed* (2d Cir. 1975) 528 F. 2d 5; *State of Illinois* v. *Harper & Row Publishers, Inc.* (N.D. Ill. 1969) 301 F. Supp. 484, 492-94; Von Kalinowski, 14 Antitrust Law and Trade Regulation § 108.08[4], p. 108-81 (1974) ("The typical issue regarding violations is often the existence of a single underlying conspiracy.

It does not necessarily matter that the victims of that conspiracy may have suffered in different ways depending upon the nature of their respective relationship with the conspirators. The essential issue common to all plaintiffs is that they must first prove a conspiracy before there can be any contention as to questions idiosyncratic to individual class members.").) Nor have petitioners shown that alternative procedural means are unavailable to correct the district court's allegedly improper certification.[1] (*E.g.*, Fed. R. Civ. P. 23(c)(4) provides a mechanism for handling conflicts among class members should they arise in the course of litigation. *See Blackie* v. *Barrack* (9th Cir. 1975) 524 F. 2d 891, 909, *cert. denied* (October 4,1976) 45 U.S.L.W. 3249 (". . . As a result, courts have generally declined ot consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit."); Von Kalinowski, *supra*, at § 108.02[5], p. 108-56.)

The decision to issue a writ of mandamus is one totally within this court's discretion. We refused to grant the writ in *Arthur Young*, *supra*, because it "would cer-

[1] The district court's certification of the antitrust class action is appealable upon final judgment. Petitioners do not satisfactorily explain why the availability of such an appeal is not an "alternative procedural means" to mandamus. Petitioners merely invoke the familiar battle-cry of class action defendants that certification of a massive class action forces defendants to settle the suits. But we have rejected this argument in the interlocutory appeals context (*see* Blackie v. Barrack (9th Cir. 1975) 524 F.2d 891, 899, *cert. denied* (Oct. 4, 1976) 45 U.S.L.W. 3249 (". . . The fairness of the pressure—*i.e.*, the sociological merits of the small claims class action—is not a question for us to decide. The fact is that Congress, by authorizing . . . Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture.")), and the soundness of the argument has been disputed on empirical grounds. (*See* Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L. J. 1123, 1136 (1974); DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II), 1976 ARA Res. J. 1273, 1347-8.)

tainly have [had] the deleterious effect of encouraging frivolous and dilatory petitions under the guise of requests for 'supervision' or 'advice' from the Court of Appeals on matters traditionally within the exclusive sphere of the trial court's discretion, at least until final judgment has been entered." (549 F. 2d at 691, n. 7). Petitioners have not persuaded us why this language does not similarly bar the exercise of our discretion in their favor in the present suit.

Petition for writ of mandamus is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1144

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT WESTERN SUGAR COMPANY & U & I INCORPORATED,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICTOF CALIFORNIA,

Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORP., et al.,

Real Parties in Interest.

ORDER

Before: BROWNING and GOODWIN, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

/s/ JAMES R. BROWNING
/s/ ALFRED T. GOODWIN
U.S. Circuit Judges

Mo Cal 2/21/77

Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

vs.

DEN-MAT, INC., ROBERT L. IBSEN, W. RICHARD GLACE, FRED H. BROCK, AND PROFESSIONAL PRODUCTS CO.,
Respondents.

Brief of Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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OCTOBER TERM, 1977

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LEE PHARMACEUTICALS,
Petitioner,

vs.

DEN-MAT, INC., ROBERT L. IBSEN, W. RICHARD GLACE, FRED H. BROCK, AND PROFESSIONAL PRODUCTS CO.,
Respondents.

Brief of Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. herein oppose the Petition for Writ of Certiorari. This consolidated Petition seeks review of the following actions of the Court of Appeals for the Ninth Circuit:

(a) denial of a petition for writ of mandamus, under 28 U.S.C. § 1651, in Court of Appeals Petition No. 76-3628, to review and to vacate:

(1) the District Court's patent validity severance Order No. 17;

(2) the District Court's discovery Order No. 24;

(3) the District Court's clarification Order No. 28; and

(4) the District Court's discovery scheduling Order No. 29;

(b) dismissal, for lack of jurisdiction under 28 U.S.C. § 1292(a)(1), in Court of Appeals Appeal No. 77-1214, of appeals from:

(1) the District Court's patent validity severance Order No. 17;

(2) the District Court's trade secret discovery Order No. 21; and

(3) the District Court's discovery Order No. 24;

(c) dismissal, for lack of jurisdiction under 28 U.S.C. § 1292(a)(1), in Court of Appeals Appeal No. 77-1215, of an appeal from the District Court's clarification Order No. 28;

(d) denial of a petition for writ of mandamus, under 28 U.S.C. § 1651, in Court of Appeals Petition No. 77-1539, to review and to vacate, *inter alia*:

(1) the District Court's patent validity severance Order No. 17;

(2) the District Court's trade secret discovery Order No. 21;

(3) the District Court's discovery Order No. 24;

(4) the District Court's conspiracy severance Order No. 25;

(5) the District Court's Order No. 26, striking certain of counterdefendants' defenses;

(6) the District Court's clarification Order No. 28;

(7) the District Court's discovery scheduling modification Order No. 32;

(8) the District Court's trade secret Order No. 33;

(9) the District Court's "clean up" Order No. 34; and

(10) the District Court's Order No. 41, assessing costs and attorneys' fees against petitioner's attorneys; and

(e) denial of an "emergency" application for writ of mandamus and prohibition, under 28 U.S.C. § 1651, in Court of Appeals Petition No. 77-2547, to review and to vacate the District Court's Order No. 80.

PROCEEDINGS BELOW

I. Proceedings In The District Court.

On October 27, 1976, the District Court, in Order No. 17,[1] severed, for separate trial pursuant to F.R.Civ.P. 42(b), "the question of the validity of the Lee Pharmaceuticals patents in suit". Also on October 27, 1976, the District Court, in Order No. 21, announced its intention "to refer discovery in the field of trade secrets to a special master", and outlined certain procedures to be followed prior to the issuance of an order of reference. In Order No. 24, filed November 1, 1976, the District Court denied, "without prejudice to their renewal at a more appropriate time", petitioner's motions to file document requests directed to respondents Den-Mat, Inc., Glace, and Brock, and a motion to take the deposition of respondent Brock.

On November 4, 1976, petitioner noticed an appeal from the District Court's Order Nos. 17, 21, and 24, pursuant to 28 U.S.C. § 1292(a)(1), contending that such orders "*de facto* deny plaintiff a preliminary injunction" against respondents' alleged misappropriation of trade secrets and trademarks, and against respondents' alleged infringement of petitioner's trademarks and alleged related acts of un-

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[1] In its *Memorandum* filed June 20, 1977, the District Court noted its then-recent decision "that it would be more convenient if every written order was numbered for ease of reference. The court assigned a number to every written order which ruled on the merits of a motion, or which otherwise addressed substantive or procedural issues. No numbers were assigned to minute orders or orders on stipulation or to extend time.

"The first order which was explicitly numbered was 'Order No. 53', filed on April 22, 1977. For the convenience of the parties," the District Court thereafter set "out a listing of the numbers assigned to those orders which were filed before the numbering system was adopted."

That same numbering system, for District Court Orders prior to number 53, is employed herein.

fair competition. An application for a hearing on such a preliminary injunction had been filed by petitioner in the District Court on April 7, 1976. The appeal from the District Court's Order Nos. 17, 21, and 24 was docketed in the Ninth Circuit Court of Appeals as Appeal No. 77-1214.

On November 2, 1976, the District Court, in Order No. 25, severed, pursuant to F.R.Civ.P. 42(b), "the issue of whether or not a conspiracy existed between plaintiff and its attorneys" to procure the patents in suit by fraud upon the United States Patent and Trademark Office, ordered *that* issue "separated from all other issues in this case" for trial "after all other issues have been disposed of", and, "[u]ntil that time, no discovery in this area will be allowed."

In Order No. 26, also filed on November 26, 1976, the District Court struck certain affirmative defenses of the counterdefendants, including petitioner herein.

In response to several motions of petitioner, the District Court filed Order No. 28 on December 1, 1976. In this Order the District Court noted that, in its 18 months of existence, this litigation had "become a gigantic, grotesque monster of procedural strife", "generating some twenty-six file folders of pleadings" with but "little progress toward resolution on the merits", with the result "that some unusual and innovative procedures would have to be brought into play if any meaningful progress was to be made." The District Court then reconsidered, and adhered to, the rulings set out in Order Nos. 17 and 24.

Petitioner noticed an appeal from Order No. 28 on December 2, 1976, pursuant to 28 U.S.C. § 1292(a)(1), contending that this order, too, "*de facto* denies plaintiff a preliminary injunction." This appeal was docketed in the Ninth Circuit Court of Appeals as Appeal No. 77-1215.

On December 1, 1976, the District Court issued discovery scheduling Order No. 29. On December 6, 1976, the District Court, in Order No. 30, denied petitioner's request for a stay of all proceedings pending resolution of Ninth Circuit Appeal No. 77-1214, noting (1) that a stay would not preserve the *status quo*; (2) the inconsistency of a stay with petitioner's demand for a preliminary injunction; (3) the requirement for "discovery which is necessary before a fair hearing on the injunction application could ever be had"; and (4) the District Court's view that

> "the appeal is frivolous and is merely a maneuver on the part of the plaintiff to further delay the progress of the lawsuit. Such a conclusion is implicit in plaintiff's suggestions that a stay might well force defendants to settle because of their inability to further finance the litigation."

On December 10, 1976, the District Court filed discovery schedule modification Order No. 32, and its trade secret discovery Order No. 33. In the latter Order, the District Court adhered to its October 27, 1976 Order No. 17.

On December 13, 1976, petitioner filed a petition for an extraordinary writ in the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1651 and F.R.App.P. 21. Docketed below as Petition No. 76-3628, this petition requested the Court of Appeals, *inter alia*, to review and to vacate the District Court's Order Nos. 17, 21, and 24.

In Order No. 34, filed January 6, 1977, the District Court disposed of certain matters pending as of November 22, 1976.

On January 13, 1977, pursuant to the District Court's Order No. 36, petitioner was allowed "to pursue discovery in order for it to determine what claims of its patents it believes are being infringed by defendants."

In response to a motion filed by respondents on December 23, 1976, the District Court, in Order No. 41, filed February 16, 1977, found that two motions of petitioner, seeking "reconsideration of prior rulings of the court", without compliance with Local Rule 3(k) of the United States District Court for the Central District of California, were "frivolous and warrant sanctions". Accordingly, petitioner's counsel, who are not parties herein, were directed to pay to respondents' counsel, within thirty days, the sum of $1200 "as reimbursement for costs and attorneys' fees expended in opposing such motion"[2].

On March 2, 1977, petitioner herein filed in the Ninth Circuit Court of Appeals a petition for extraordinary writ pursuant to 28 U.S.C. § 1651 and F.R.App.P. 21. Docketed in the court below as Petition No. 77-1539, this petition requested the Court of Appeals, *inter alia*, to review and to vacate the District Court's Order Nos. 17, 21, 24, 25, 26, 28, 32, 33, 34, and 41.

In accordance with its intentions, announced in Order No. 17, and adhered to in Order Nos. 28 and 33, the District Court, in Order No. 59, filed April 25, 1977, appointed a special master to oversee "the entire issue of trade secrets". In response to petitioner's objection to the appointment of a special master for this purpose, Order No. 59 was vacated in Order No. 66, filed May 12, 1977, and petitioner was directed to "furnish this court, in camera, a detailed statement of all trade secrets which it claims are being misappropriated" by respondents. In response to petitioner's motion "to defer operation of Order No. 66 pending clarification at the June 6, 1977 hearing", filed

[2]The propriety of Order No. 41, and its award of $1,200 in sanctions, is presently before the Ninth Circuit Court of Appeals in Appeal No. 77-1984.

May 19, 1977, the District Court, in Order No. 72, filed May 26, 1977, directed petitioner to file "on the record an exact, explicit, specific, detailed, and step-by-step statement of each and every claimed trade secret", and set out in minute detail the form which such "statement" was to take.

On June 2, 1977, petitioner moved to vacate Order No. 72. This motion was denied on its day of filing, in Order No. 75, the District Court finding that its jurisdiction had not been ousted by then-pending Ninth Circuit Appeal Nos. 77-1214 and 77-1215, and further, that

> "this motion has been filed for the sole purpose of disrupting this court's efforts to move this case along toward some ultimate conclusion."

In Order No. 80, filed June 28, 1977, the District Court noted that

> "[f]or nearly fifteen months the plaintiff has been seeking a preliminary injunction against alleged misappropriation by the defendants of plaintiff's trade secrets. This hearing has not gone forward because the plaintiff has not yet identified what trade secrets it asserts are being misappropriated. In fact, plaintiff has thus far thwarted every effort of the court to obtain it",

and ordered

> "that the information which plaintiff is required to produce under Order No. 72 shall be furnished the court in camera. Order No. 72 shall in all other respects remain unchanged. Plaintiff is already in default in having failed to produce the information requested within the time specified in Order No. 72, but compliance with the order will be accepted by this court provided the information is filed not later than June 30, 1977."

Petitioner's statement of trade secrets was filed *in camera* on June 30, 1977. Order No. 80 also required respondents to

file a statement of their trade practices, similar in detail to that required of petitioner in Order No. 72.

On July 8, 1977, respondents filed a "motion for reconsideration of Order No. 80", contending that their trade practices had twice been revealed to petitioner's counsel pursuant to protective orders in effect in the District Court, in written documents previously produced or forwarded to petitioner's counsel. In Order No. 81, filed July 13, 1977, petitioner was granted one week's time

> "to bring to the court's attention any further information which is needed concerning the defendants' trade practices, and the reasons why plaintiff's statement of trade secrets should not now be released to defendants' counsel with the restricted information status."

Petitioner's response to Order No. 81 resulted in the filing, on August 5, 1977, of the District Court's Order No. 83. Order No. 83 directed petitioner and respondents to submit, by September 2, 1977, all arguments and materials in support of, and in opposition to, respectively, the preliminary injunction sought by petitioner in April 1976.

In response to Order No. 83, petitioner filed a paper on or about August 12, 1977, in which it stated that it was

> "not prepared to proceed and therefore respectfully declines to proceed in the manner defined in Order No. 83, filed August 5, 1977."

In Order No. 84, filed August 16, 1977, the District Court carefully considered, and rejected, the arguments advanced by petitioner in its response to Order No. 83. Order No. 84 concluded:

> "The court expects plaintiff to comply fully with Order No. 83."

On September 2, 1977, respondents served, and on September 6, 1977, they filed, two memoranda, five affidavits, 12 volumes of exhibit-containing appendices, and a motion for summary judgment of dismissal of petitioner's trade secret and trademark infringement/unfair competition claims. Petitioner neither served nor filed any papers in compliance with the mandate of Orders Nos. 83 and 84.

II. Proceedings In The Court Of Appeals.

On March 28, 1977, the Court of Appeals, over the signatures of Circuit Judges Ozell M. Trask and J. Clifford Wallace, issued the following Order in Ninth Circuit Appeal Nos. 77-1214 and 77-1215, and in Ninth Circuit Petition Nos. 76-3628 and 77-1539, "[u]pon due consideration":

> "(a) the petition for writ of mandamus, No. 76-3628 is denied;
>
> "(b) the petition for writ of mandamus, No. 77-1539 is denied;
>
> "(c) the motion for extension of time is treated as a motion to file late response and is granted;
>
> "(d) the motion for stay is denied; and
>
> "(e) appeals Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable."

Also on March 28, 1977, the Clerk of the Court of Appeals addressed a letter to "All Counsel", informing them of the dismissal of appeal Nos. 77-1214 and 77-1215 "for lack of jurisdiction."

On April 4, 1977, Petitioner filed a motion addressed to the court *en banc*, requesting that the March 28, 1977 Order be vacated on the basis that such Order had been issued by "a panel or division consisting solely of two judges."

On April 28, 1977, a Revised Order, which was "Before" Circuit Judges Trask, Wallace, and Herbert Y. C. Choy," albeit unsigned, provided in Ninth Circuit Appeal Nos. 77-1214 and 77-1215 and Petition Nos. 76-3628 and 77-1539:

"On April 4, 1977, Lee Pharmaceuticals filed two emergency motions requesting a suspension of the periods for seeking rehearing and issuance of the mandate and for en banc consideration of the authority of the panel which issued this Court's order of March 28, 1977. Solely to facilitate the proceedings in the district court, the court issues the following order:

"(a) The petition for writ of mandamus, No. 76-3628 is denied;

"(b) The petition for writ of mandamus, No. 77-1539 is denied;

"(c) The motion for extension of time is treated as a motion to file late response and is granted;

"(d) The motion for stay is denied;

"(e) Appeal Nos. 77-1214 and 77-1215 are dismissed for lack of jurisdiction, the orders appealed from not being appealable;

"(f) The emergency motion addressed to the court en banc shall be treated as a suggestion for hearing en banc and shall be circulated to the active bench for a vote; and

"(g) The emergency motion to suspend the periods of time for rehearing and issuance of the mandate is denied and new periods of time pursuant to Rules 40 and 41 Federal Rules of Appellate Procedure shall commence from the date of the entry of this order.

"This order shall in no way be construed as a comment on the merits, or lack thereof, of the arguments set forth in the emergency motion addressed to the court en banc."

On July 7, 1977, the Court of Appeals issued the following unsigned Order in Appeal Nos. 77-1214 and 77-1215 and in Petition Nos. 76-3628 and 77-1539:

"The emergency motion addressed to the court en banc having been circulated to the active bench and no judges electing to accept the suggestion for hearing en banc, the motion is hereby denied."

On July 11, 1977, the Court of Appeals issued the following unsigned Order in Appeal Nos. 77-1214 and 77-1215:

"Upon due consideration, the petition for rehearing en banc regarding the Court's dismissal of appeal nos. 77-1214 and 77-1215 for lack of jurisdiction is denied."

On July 13, 1977, the Court of Appeals, in an unsigned Order "Before" Circuit Judges Trask, Choy, and Wallace, ruled:

"(a) the motion for extension of time to file petitions for rehearing is granted and the petitions heretofore received are ordered filed;

"(b) the motions to defer consideration of the petitions for rehearing are denied;

"(c) the 'supplementation and petition for rehearing' filed in no. 76-3628 is denied; and

"(d) the 'supplementation and petition for rehearing' filed in no. 77-1539 is denied."

On July 14, 1977, the Court of Appeals, over the signatures of Circuit Judges Trask and J. Blaine Anderson, issued the following Order in Ninth Circuit Petition No. 77-2547:

"Upon due consideration, the petition for writ of mandamus is denied."

PROCEEDINGS IN THIS COURT.

On or about August 17, 1977, Petitioner filed a "Supplement" to its Petition in this case, reproducing in such "Supplement's" appendix, other allegedly infirm, two-judge orders issued by the Ninth Circuit Court of Appeals, and presently before this Court in No. 77-4.

In a related case, No. 77-259, Petitioner herein seeks a second Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. No. 77-259 seeks review of such Court of Appeals' Orders dated July 12 and 26, 1977, in Ninth Circuit Petition No. 77-1969, denying disqualification of the assigned United States District Judge pursuant to 28 U.S.C. § 455(a).

QUESTIONS PRESENTED.

1. Does 28 U.S.C. § 46(d), which provides that "[a] majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum", in accordance with established legal precepts and rules of statutory construction, so modify 28 U.S.C. §§ 46(b) and (c) to permit determinations in civil appeals and petitions for extraordinary writs, exclusive of those emanating from three-judge trial courts or from administrative agency determinations, to be made by only two judges?

2. No matter whether the answer to Question 1 is affirmative or negative, does any paragraph of 28 U.S.C. § 46 permit a party before a Court of Appeals to select, or participate in the selection of, the judges who shall constitute the panel or division assigned to hear and decide his appeal or petition for an extraordinary writ?

STATUTES INVOLVED.

This Petition nominally concerns 28 U.S.C. § 46, which provides:

> **"§ 46. Assignment of judges; divisions; hearings; quorum**
>
> "(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and and hear the cases and controversies assigned as the court directs.
>
> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.
>
> "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

STATEMENT OF THE CASE.

The complaint in this extraordinary case, filed July 7, 1975 and naming respondents Den-Mat, Inc. ("Den-Mat"), Ibsen, and Professional Products Co. as defendants, alleged willful infringement of two of petitioner's patents, misappropriation of an unspecified number of petitioner's unidentified trade secrets, and charged such respondents with unidentified acts of unfair competition. Respondent Den-Mat and petitioner compete in the manufacture, sale, and distribution of composite restorative dental materials, *i.e.*, compositions designed for use by dental practitioners in the repair and restoration of living or artificial teeth. Respondent Ibsen, president of Den-Mat, formerly conducted clinical research, without compensation, for petitioner on its developmental products prior to their distribution to dental practitioners. Respondent Professional Products Co. is a distributor of Den-Mat's products.

The presently viable Second Amended Complaint, filed January 15, 1976, joins two of petitioner's former employees, respondents Glace and Brock, as defendants, alleges willful infringement of three of petitioner's patents and of five of its federally registered trademarks, and persists in its allegations of misappropriation of petitioner's trade secrets and unspecified acts of unfair competition.

The remaining counterclaims of Den-Mat and Ibsen, filed April 28, 1976, allege:

(a) petitioner's violation of the Federal Antitrust Laws, particularly 15 U.S.C. §§ 1, 2, 13(a), 13(c), 13(d), 13(e), and 14;

(b) petitioner's violation of the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16600 and 16700 *et seq.*, the California Unfair Practices Act, Cal. Bus. & Prof.

Code §§ 17000 *et seq.*, and other provisions of the California Business and Professions Code;

(c) petitioner's false marking of its products, in violation of 35 U.S.C. §§ 292(a) and (b); and

(d) petitioner's acts of unfair competition and tortious interference with existing and prospective business relationships.

Counterdefendants named in such counterclaims include petitioner, petitioner's president, and the wife of petitioner's president. Co-conspirators named in such counterclaims include, *inter alia*, counsel to petitioner, at least in their roles, as alleged, in the procurement of the patents in suit by fraud upon the United States Patent and Trademark Office, and in filing and prosecuting this extraordinary litigation.

Indicia of the extraordinary nature of this case, to the extent not communicated in the "Proceedings In The District Court", *supra*, include, *inter alia*, the following:

(a) the holding of *18* normally noticed and *ex parte* hearings by the District Court;

(b) the District Court's issuance of *84* orders *before* a trial on the merits;

(c) petitioner's filing of at least *27* motions to compel discovery pursuant to F.R.Civ.P. 37(b);

(d) petitioner's filing of at least *20* motions for protective orders, "deferrals", extensions or enlargements of time, stays, and suspensions of proceedings;

(e) petitioner's filing of no fewer than *four* motions to disqualify the Honorable Jesse W. Curtis, the assigned District Judge, pursuant to 28 U.S.C. § 455(a);

(f) the filing, by petitioner, or by its counsel, *before* a trial on the merits, of *nine* appeals and petitions for extraordinary writs in the Court of Appeals for the Ninth Circuit;

(g) the filing, on behalf of petitioner, of a psychiatrist's affidavit in Ninth Circuit Petition No. 77-1969[3], which purports to attest, *inter alia*, to Judge Curtis' disposition against petitioner and its counsel; and

(h) the assignment, on August 19, 1977, by the Honorable Albert Stephens, Jr., Chief Judge of the United States District Court for the Central District of California, of the Honorable Martin Pence, United States District Judge for the District of Hawaii, "to review the affidavits and averments filed" in the District Court "in support of plaintiff's contention that Judge Curtis should be disqualified and to determine whether there is any basis upon which his impartiality might reasonably be questioned."

Such extraordinary proceedings are explained by the extraordinary litigation philosophy of plaintiff's trial counsel, as articulated in paragraphs 3-5 of an "Affidavit of Mary Helen Sears In Support of 'Motion For Retraction And Expungement From The Record Of Statements Made By The Court On January 20 [10], 1977 Which Reflect Adversely Upon Counsel For The Plaintiff'" (Appendix, p. A1), filed in the District Court on February 2, 1977.

Such extraordinary litigation philosophy has failed to impress the District Court and the Court of Appeals. In the latter forum, three petitions for extraordinary writs which are subjects of the instant Petition, Nos. 76-3628, 77-1539,

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[3]The affidavit is set out in the Petition for a Writ of Certiorari, No. 77-259, at p. 22a *et seq.*

and 77-2547, were denied, and two appeals, Nos. 77-1214 and 77-1215, were dismissed for lack of jurisdiction.

Seizing, however, upon the Court of Appeals' apparent assignment of two-judge panels or divisions to hear and decide civil appeals and petitions for extraordinary writs, in the absence of disagreement between members of such two-judge courts, petitioner posits a deprivation of its *right* to a hearing before *three* judges, believed by it to be granted by 28 U.S.C. § 46, and demands hearings, *de novo*, before three-judge courts, none of whose members have previously considered petitioner's appeals and petitions.

Examined closely, petitioner's contentions are totally without merit.

ARGUMENT.

A. The Procedures Of The Ninth Circuit Court Of Appeals In Deciding Cases And Controversies Are In Accord With Established Legal Precepts And Rules Of Statutory Construction.

In the absence of contrary knowledge, respondents accept as true, for purposes of the instant Petition for Writ of Certiorari, the procedures of the Ninth Circuit Court of Appeals as set out in the Petition's Appendix B. However, even if true, the such procedures provide petitioner with no grievance under 28 U.S.C. § 46.

Textile Mills Securities Corp. v. *Commissioner*, 314 U.S. 326 (1941), definitely construed former Section 212 of Title 28, United States Code, a predecessor to the present 28 U.S.C. § 46. Former Section 212, deriving from § 117 of the 1911 Judicial Code, provided that:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established". 314 U.S. at 328.

This Court rejected any literal reading of § 117, 314 U.S. at 330, and emphasized that

> "Though the problem of construction is beset with difficulties, the conclusion that *§ 117 provides merely the permissible complement of judges for a circuit court of appeals* results in greater harmony [footnote omitted] than if the language of § 117 is taken too literally." 314 U.S. at 328; emphasis supplied.

Former Section 212 of Title 28, United States Code, also received more than passing notice in *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1946). At issue in

Ayrshire Collieries was the propriety of an order issued by only two judges under the Urgent Deficiencies Act, former Section 47 of Title 28, United States Code.[4] This Court concluded that

> "[w]hen the framers of the Urgent Deficiencies Act declared that these applications 'shall be heard and determined by three judges,' we assume that they meant exactly what they said. . . .
>
> "It is significant that this Act makes no provision for a quorum of less than three judges. *Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases* [footnote omitted]. 28 U.S.C. 212. 28 U.S.C.A. 212. The absence of such a quorum provision as to three-judge district courts is a strong corroborating indication that participation by all three judges is necessary to render a valid decision." 331 U.S. at 137, 138-139; emphasis supplied.

Given the foregoing comparison of procedures to be followed by a Court of Appeals, as opposed to a three-judge district court, coupled with the express "quorum" provision of 28 U.S.C. § 46(d), the conclusion is inescapable that participation by *each* of three circuit judges in the hearing and determination of causes is *not* necessary for the rendition of valid Circuit Court decisions.

The hearing and determination of cases and controversies is the subject of both paragraphs (b) and (c) of 28 U.S.C. § 46. Section 46(b) contains the seemingly mandatory language:

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[4]With respect to the Interstate Commerce Commission, present statutes 28 U.S.C. §§ 2284 and 2325.

> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, *each consisting of three judges.*" (Emphasis supplied.)

Such language, however, is expressly mollified by Section 46(c):

> "(c) Cases and controversies shall be heard and determined by a court or division *of not more than three judges. . . .*"

Petitioner apparently urges your Honorable Court to rewrite, by judicial fiat, 28 U.S.C. § 46(c) to read:

> "(c) Cases and controversies shall be heard and determined by a court or division of not *less* than three judges. . . ."

The statute does not so read. Furthermore, when 28 U.S.C. §§ 46(c) and (d) are read in context, as they must be read, the "majority" and "quorum" language of the latter expressly authorize *two* judges of a Court of Appeals to hear and decide cases and controversies.

Respondents' Question No. 1 must be answered in the affirmative; petitioner's Question No. 1 must be answered in the negative.

B. 28 U.S.C. § 46(c) Is A Grant Of Power To The Courts Of Appeal, Precluding Any Assertion By A Litigant Of A Right To Select, Or To Participate In The Selection Of, The Judges Who Shall Hear And Determine His Cause.

28 U.S.C. § 46(c) was closely analyzed in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953), in which Mr. Chief Justice Vinson framed and responded to the issues as follows:

"What particular right, if any, does it [*i.e.*, 28 U.S.C. § 46(c)] give to a litigant in a Court of Appeals? To what extent is he entitled to put the merits of his cause before each member of the court in pressing his demand for a hearing or a rehearing before the entire court?

"In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. . . . It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." 345 U.S. at 250.

To reach petitioner's second question, your Honorable Court would be required to *rewrite* 28 U.S.C. § 46(c), as noted above, and to *ignore* the express "majority" and "quorum" language of 28 U.S.C. § 46(d). At its core, petitioner's second question asserts an unqualified right of a disappointed Court of Appeals litigant to a second hearing before an entirely different panel or division, or before a Court of Appeals *en banc*. *Western Pacific Railroad, supra*, expressly rejected any such purported right:

> "*Litigants are certainly given no special standing to partake, as of right, in the court's decisions pertaining to the arrangement of its calendar and the assignment of cases to divisions.* Just as *the statute makes no provision binding the court to entertain every request that a particular case be assigned to a particular division*, so it should not be construed to compel the court to entertain, en banc, motions for a hearing or rehearing en banc.
>
> "A contrary reading—one which would sustain petitioners—would obviously require a practice which might

> thrust unwarranted extra burdens on the court. It is difficult to believe that Congress intended to give an automatic, second appeal to each litigant in a Court of Appeals composed of more than three judges. Yet petitioners would have us hold that such a 'horizontal' appeal is implicit in § 46. . . ." 345 U.S. at 258; emphasis supplied.

Question No. 2 of respondents, as well as of petitioner, must be answered in the negative.

CONCLUSION.

For the reasons set forth above, the Petition For A Writ of Certiorari To The United States Court Of Appeals For the Ninth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on this 13th day of September, 1977, three copies of the Brief of Respondents Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit, were served, in compliance with Supreme Court Rules 33(1) and 33(2)(a), by air mail, postage prepaid, upon counsel to Petitioner, and upon the Solicitor General of the United States, respectively. I further certify that all parties required to be served have been served.

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APPENDIX

PARAGRAPHS 3-5 OF AFFIDAVIT OF MARY HELEN SEARS IN SUPPORT OF "MOTION FOR RETRACTION AND EXPUNGEMENT FROM THE RECORD OF STATEMENTS BY THE COURT ON JANUARY 20, 1977 WHICH REFLECT ADVERSELY UPON COUNSEL FOR THE PLAINTIFF"

3. I am an experienced litigation lawyer, admitted to practice in Virginia and the District of Columbia and before numerous federal courts including seven of the eleven United States Courts of Appeals and the Supreme Court. Since 1961, I have unremittingly spent by far the major proportion of my time in the representative [sic] of clients in patent, trademark and unfair competition litigation and related antitrust matters before a plurality of courts throughout the United States.

4. I have at all times had, and I continue to have, the highest personal respect and regard for the judicial process, for judicial decorum and for the office of judge or justice, and I have at all times endeavored to conduct myself in a manner demonstrative of that respect.

5. I have also at all times understood and believed, and I still understand and believe, that it is the duty and responsibility of counsel in each and every case

(a) to pursue a client's cause, if just, with vigor and to refuse to accede to the correctness of court orders that are inconsistent with established law or with a client's legal and constitutional rights, even while respecting such orders so long as they subsist;

(b) even while respecting legally or factually incorrect orders of courts, to use every available means afforded by applicable rules and statutes for challenging such

incorrect orders including motions for (i) rehearing, (ii) vacation, (iii) clarification, (iv) reconsideration, and (v) revocation to the same court, and appellate remedies, including petitions for extraordinary writs where grounds for such writs appear reasonably to exist;

(c) whenever it appears from the record that a judge has exceeded his legal authority to bring the matter to his attention and if he refuses to correct or modify his apparent excess and cannot produce clear justification based on statute, rule or precedent, to apply to an appellate court for review and correction;

(d) whenever a judge has made fact findings or observations contrary to or unsupported by the record, to call the matter to his attention and seek a correction and, if he refuses correction and fails to point to facts that fully justify his findings, to exhaust in accordance with the rules such appropriate remedies, including appellate remedies, as may be available; and

(e) whenever the record suggests that an assigned judge is not behaving in an impartial, objectively judicial manner to bring the matter to his attention and, if a satisfactory explanation or clarification cannot be obtained, to file a motion for disqualification pursuant to applicable rules and statutes which afford the right to do so, to the end that the client may have a fair and impartial trial of its case.

/s/ MARY HELEN SEARS

Mary Helen Sears

WASHINGTON
DISTRICT OF COLUMBIA } ss

Sworn to and subscribed this 31st day of January, 1977.

(Original Notarized)

Notary Public

Supreme Court, U. S.
FILED
SEP 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., et al.,

REPLY MEMORANDUM OF LEE PHARMACEUTICALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

No. 72-244

LEE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., et al.,

REPLY MEMORANDUM OF LEE PHARMACEUTICALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents' opposition to the petition is largely irrelevant to any aspect of the two questions posed (Pet. 2). It is, rather, largely directed to a recitation *in extenso* of respondents' unilateral version of various details of the proceedings below that are *not raised* by the petition.

To the extent respondents' paper is at all pertinent here, it serves to emphasize the importance of the questions presented in the petition and the need for their prompt resolution by this Court. Thus respondents concede, albeit grudgingly, (Opp. 19) the existence of the pervasive Ninth Circuit practice of routinely assigning

panels of only two judges, rather than the "separate divisions, each consisting of three judges" facially required by 28 U.S.C. 46(b), to deal with cases and controversies.[1] Respondents also necessarily concede, by manifest inability to cite a case directly in point, that the questions raised are of first impression. The conflict between Ninth Circuit practice and the interpretation afforded 28 U.S.C. 46(b) by other federal courts of appeal likewise stands conceded. Hence, the need is perforce conceded for this Court to exercise its supervisory authority to insure that *all* federal courts of appeals perform their duties in a procedurally uniform, predictable and stable manner consistent with their statutory limits, so as to instill and promote public confidence in their innate fairness.

Respondents' inability to counter the petition is further apparent from their tacit concession that the questions presented therein are not answerable—a concession manifest from the *wholly different*, straw man questions respondents have first framed (Opp. 13) and then conveniently demolished. (Opp. 19-23). Thus:

(1) *Petitioner's* first question is

"1. Do 28 U.S.C. §§ 46(b) and (c) require that a panel of three judges be assigned to decide every civil case and controversy raised before a Court of Appeals, including petitions for extraordinary writs, and prohibit a Court of Appeals from assigning panels of only two judges to make such determinations?" (Pet. 2)

To divert attention from its thrust, respondents have framed an entirely *different* question 1 (Opp. 13) which they have proceeded to answer with precedent purporting to establish the propriety, in certain defined circumstances, of the disposition of a case or controversy by a quorum of only two of the appellate judges originally and properly assigned to a "separate division . . . consisting of three judges" as specified in 28 U.S.C. 46(b) (Opp. 19-21). But this point is *not* in dispute and the petition does *not* seek its examination in this Court.

[1] The pervasive nature of the practice is apparent from both the petition and its supplement.

(2) Petitioner's Question 2 is:

"2. If the answer to question 1 is "yes" and timely objection is made by an adversely affected party, may the original void two-judge decision be validated by procuring the subsequent concurrence of a third originally non-participating judge, or must a new panel of three judges be assigned to consider the case de novo?"

Obviously unable to deal with the several and varied constitutional and jurisdictional overtones of federal appellate court exercise of a power not delegated by Congress, respondents strive to deprecate the issue by posing a different, almost inanely irrelevant, self-answering question (Opp. 13) Suffice it to note that petitioner has *never* suggested it *could* or *should* have a voice in selecting the specific appellate judges to sit on its case in the court below. *Per contra*, petitioner has contended only that three appellate judges should be assigned to so sit and that each of those three should be untainted by participation in any previous, void, two-judge adjudication of the same case.

CONCLUSION

Respondents' opposition is so irrelevant and farfetched that it simply underlines the need for issuance of the writ as requested.

Respectfully submitted,

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